

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA



In the Matter of the Appeal of)
CHARLES E. HAMMOND)

Appearances:

For Appellant: J. E. Hammond, Certified Public Accountant

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner; Harrison Harkins, Assistant Franchise Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 19 of the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Charles E. Hammond to a proposed assessment of additional tax in the amount of \$43.86 for the year ended December 31, 1935.

The appeal concerns the taxability of the sum of \$4,908.33 received by the Appellant upon his retirement in 1935 as his community share of the excess over and above his own contribution to the Provident Fund of the Combined Petroleum Companies. Membership in the Fund is available to the employees of any of the several companies which have joined the Fund. Each employee who has been admitted to membership is required to contribute to the Fund a percentage of his salary, as and when the same is received by him, and his employer is likewise required to contribute. These contributions, together with interest thereon, are credited to the account of the member, the balance of which is payable to him within six months following the termination of his employment if at that time he is at least fifty years of age. The Appellant was seventy years of age at the time of his retirement.

The Appellant contends that the amounts credited to his account prior to January 1, 1935, had "accrued" prior to that date, within the meaning of Section 36 of the Personal Income Tax Act of 1935 and Article 36-1 of the Regulations pertaining to the Act, and that, accordingly, no portion thereof is subject to taxation, notwithstanding the fact that it was received in 1935. The Commissioner takes the position that there was no unqualified right or claim ultimately to receive these amounts, and, therefore, no accrual of income prior to January 1, 1935. With respect to the employer's contributions and the interest thereon, the Commissioner points out that under the Regulations of the Fund, the failure of the employee, within six months after demand, to make any of the payments required of him subject his membership to cancellation by the Board of Administrators, in which event he may receive only the amount of his own contributions plus interest thereon. With respect to the interest on

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Appellant's own contributions the Commissioner's contention is based on the ground that the Appellant's rights were dependent on the continued solvency of the Fund.

In view of the fact that on December 31, 1934, the Appellant had the unqualified right to terminate his employment and to receive from the Fund within six months thereafter the entire amount standing to his credit, we believe that this amount, to the extent that it exceeded Appellant's own contributions, represented income accrued prior to January 1, 1935. (*Continental Tie & Lumber Co. v. United States*, 286 U. S. 290; *H. Liebes & Co. v. Commissioner*, 90 F. (2d) 932.) The decisions holding that income does not accrue when the taxpayer's right to receive it is subject to certain contingencies (see *Lucas v. North Texas Lumber Co.*, 281 U. S. 11; *United States v. Safety Car Heating & Co.* 297 U. S. 88; *H. Liebes & Co. v. Commissioner*, *supra*) do not, in our opinion, preclude the recognition of an accrual of income merely because rights presently existing are subject to cancellation in the event of the failure of the taxpayer to meet certain obligations imposed upon him. The test in such a case appears to be whether there was a reasonable expectation that the amount would be received (see *Helvering v. Russian Finance & Construction Co.*, 77 F. (2d) 324, 327). Since in this case no reasons have been advanced for questioning on December 31, 1934, the ability of the Appellant to make the required payments to the Fund from his salary or other sources during the remaining period of his employment, and since it was obviously greatly to his advantage to make such payments, there was, we believe, far more than a mere reasonable expectation at that time that the Appellant's rights would not be lost and that he would receive the full amount standing to his credit. Similarly, there being no doubt expressed as to the solvency of the Fund, the interest on the Appellant's contributions thereto may be regarded as having accrued prior to 1935, for under the H. Liebes & Co. and Russian Finance & Construction Co. cases the mere possibility that the Fund would become insolvent does not preclude the accrual of the income,

No mention has been made either by the Commissioner or the Appellant of Section 12(f) of the Personal Income Tax Act, relating to pension trusts, and we are not, accordingly, passing upon any possible application that section may have to the situation involved herein.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Charles E. Hammond to a proposed assessment of additional tax in the amount of \$43.86 for the year ended December 31, 1935, pursuant to Chapter 329, Statutes of 1935, as amended, be and the same is hereby reversed. Said ruling is hereby set aside and the Commissioner is hereby directed to

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proceed in conformity with this order.

Done at Sacramento, California, this 16th day of June, 1942,
by the State Board of Equalization.

R. E. Collins, Chairman
Wm. G. Bonelli, Member
Geo. R. Reilly, Member
Harry B. Riley

ATTEST: ~~Dixwell~~ L. Pierce, Secretary